STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2011-158-E

In the Matter of: Application Regarding the Acquisition of Progress Energy, Incorporated by Duke Energy Corporation and Merger of Progress Energy Carolinas, Incorporated and Duke Energy Carolinas, LLC	**PROPOSED ORDER OF INTERVENOR CITY OF ORANGEBURG, SOUTH CAROLINA**

CERTIFICATE OF SERVICE

I, Pablo O. Nüesch, hereby certify that I have caused the Proposed Order of the City of Orangeburg, South Carolina to be served on the parties listed below by first-class mail, postage prepaid, or electronic mail:

Courtney D. Edwards
Nanette S. Edwards
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201

Frank R. Ellerbee, III
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202-0944

Kodwo Ghartey-Tagoe
Duke Energy Carolinas, LLC
Post Office Box 1006/EC03T
Charlotte, NC 28201-1006

Len S. Anthony
Progress Energy Carolinas, Inc.
Post Office Box 1551 - MC 17A4
Raleigh, NC 27602

Robert R. Smith, II
Moore & Van Allen, PLLC
100 North Tyron St., Suite 4700
Charlotte, NC 28202

Scott Elliott
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201

Garrett A. Stone
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone, PC
1025 Thomas Jefferson St., NW
Eighth Floor, West Tower
Washington, DC 20007

John H. Tiencken
Paul J. Conway
Tiencken Law Firm, LLC
234 Seven Farms Drive, Suite 114
Charleston, SC 29492

Douglas Jennings, Jr.
Douglas Jennings Law Firm, LLC
Post Office Box 995
Bennettsville, SC 29512

Michael N. Couick
Christopher R. Koon
The Electric Cooperatives of South Carolina, Incorporated
808 Knox Abbott Drive
Cayce, SC 29033

D. Peters Wilborn, Jr.
Derfner, Altman & Wilborn
Post Office Box 600
Charleston, SC 29402

Jonathan D. Newman
Sherman, Dunn, Cohen, Leifer, & Yellig, P.C.
900 Seventh Street, NW, Suite 1000
Washington, DC 20001

J. Blanding Holman, IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

K. Chad Burgess
Matthew W. Gissendanner
South Carolina Electric & Gas Company/SCANA Corp.
220 Operation Way- MC C222
Cayce, SC 29033-3701

Gudrun Elise Thompson
Southern Environmental Law Center
601 W. Rosemary Street
Chapel Hill, NC 27515

Kendal C. Bowman
Progress Energy Service Company
410 South Wilmington Street
Raleigh, NC 27601

Jill Mara Tauber
Southern Environmental Law Center
122 C Street, NW
Suite 390
Washington, DC 20001

Respectfully submitted,

/s/ *Pablo O. Nuesch*

Pablo O. Nuesch
James N. Horwood
Peter J. Hopkins
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

Attorneys for City of Orangeburg, South Carolina

June 22, 2012

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2011-158-E — ORDER NO. 2012-____

_____, 2012

In the Matter of: Application Regarding the Acquisition of Progress Energy, Incorporated by Duke Energy Corporation and Merger of Progress Energy Carolinas, Incorporated and Duke Energy Carolinas, LLC	**PROPOSED ORDER OF INTERVENOR CITY OF ORANGEBURG, SOUTH CAROLINA**

I. INTRODUCTION

On April 25, 2011, Duke Energy Corporation ("Duke") and Progress Energy, Inc. ("Progress") (together, "Applicants") initiated this proceeding by submitting—on behalf of their electrical utility subsidiaries, Duke Energy Carolinas, LLC ("DEC") and Progress Energy Carolinas, Inc. ("PEC")—an Application to engage in a business combination transaction. The only matter now remaining before the Commission is Applicants' request for approval of the Joint Dispatch Agreement ("JDA") entered into between DEC and PEC.

The South Carolina Office of Regulatory Staff ("ORS") is a party to this proceeding pursuant to S.C. Code Ann. Section 58-4-10. The following parties are intervenors: the Department of Public Utilities of the City of Orangeburg, South Carolina ("Orangeburg"); Nucor Steel–South Carolina; the South Carolina Energy Users Committee ("SCEUC"); Central Electric Power Cooperative, Inc. ("Central") and The Electric Cooperatives of South Carolina, Inc. ("ECSC"); the International Brotherhood of Electrical Workers; Environmental Defense Fund, South Carolina Coastal Conservation

League, and Southern Alliance for Clean Energy (collectively, "Environmental Intervenors"); and South Carolina Electric & Gas Company ("SCE&G").

The hearing was held at the Commission offices on December 12, 2011, with the Honorable John E. "Butch" Howard, Chairman, presiding. At the hearing, DEC was represented by Frank R. Ellerbe III, Esquire, and Kodwo Ghartey-Tagoe, Esquire. PEC was represented by Len S. Anthony, Esquire, and Kendal C. Bowman, Esquire. Central and ECSC were represented by Douglas Jennings, Jr., Esquire, John H. Tiencken, Esquire, and Christopher R. Koon, Esquire. Nucor Steel–South Carolina was represented by Robert R. Smith II, Esquire, and Michael K. Lavanga, Esquire. The Environmental Intervenors were represented by J. Blanding Holman IV, Esquire, and Gudrun Elise Thompson, Esquire. Orangeburg was represented by James N. Horwood, Esquire and Pablo O. Nüesch, Esquire. SCE&G was represented by K. Chad Burgess, Esquire. The SCEUC was represented by Scott Elliott, Esquire. Nanette S. Edwards, Esquire, and Courtney D. Edwards, Esquire, appeared on behalf of the South Carolina Office of Regulatory Staff.

II. PROCEDURAL HISTORY

On April 25, 2011, the Applicants applied to this Commission to engage in a business combination transaction.[1] The Applicants explained that Duke would acquire Progress at the holding company level, and that DEC and PEC would be merged at some point in the future. *Id.* ¶ 6. The Applicants requested approval of the merger of DEC and PEC, as well as a Joint Dispatch Agreement between DEC and PEC. *Id.* ¶ 26.

[1] Application of Duke Energy Corp. & Progress Energy, Inc. to Engage in a Business Combination Transaction ("Application").

Pursuant to Order No. 2011-611 dated August 24, 2011, the Commission set this matter for hearing and established a schedule of prefiling dates. The Commission took such action mindful of Applicants' assertion that "[t]he Commission should review the proposed acquisition of Progress by Duke, and the merger of DEC . . . and PEC." Order No. 2011-611. The Commission also noted Applicants' assertion that "while S.C. Code Ann. § 58-27-1300 'does not expressly grant the Commission jurisdiction over Duke acquiring Progress[,] given that [a.] the merger of DEC and PEC cannot occur absent the acquisition of Progress by Duke, and [b.] the primary impact of the acquisition of Progress by Duke is upon DEC and PEC, the Applicants, on behalf of PEC and DEC, will treat the two transactions as one for the purposes of this Application." *Id.* Accordingly, the Commission scheduled the hearing pursuant to its authority under S.C. Code Ann. § 58-27-1300. *Id.* The Commission stated that it would receive testimony "regarding the merger at both the holding company and operating company levels, as well as with regard to the joint dispatch proposal." *Id.*

On August 25, 2011, Central and ECSC requested the Commission to appoint a hearing officer to handle procedural issues and motions in this docket.[2] Pursuant to Order No. 2011-654 dated September 7, 2011, the Commission appointed Joseph M. Melchers, Esquire, as hearing officer.

On September 6, 2011, ORS executed a settlement agreement with the Applicants. Hr'g No. 11-11250, Tr. 60:21-22 (Dec. 12, 2011) ("Tr."). However, the settlement agreement was not filed with this Commission, *id.* 60:23, and the parties

[2] Letter from John H. Tiencken, Jr., Counsel for Cent. Elec. Power Coop. & the Elec. Coops. of S.C., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Aug. 25, 2011).

agreed to withdraw the settlement agreement during the hearing in this matter, *id.* 119-122.

On September 13, 2011, the Applicants withdrew their application for approval of the merger of DEC and PEC, stating that the two electrical utilities would not be merged for several years.[3] The Applicants reaffirmed their request that this Commission approve the JDA. *Id.*

On September 14, 2011, DEC and PEC submitted the Joint Testimony of James E. Rogers—chairman, president, and CEO of Duke—and William D. Johnson—chairman, president, and CEO of Progress. DEC and PEC also submitted the Direct Testimonies of Alexander J. Weintraub, PEC's Vice President – Fuels and Power Optimization; Lynn J. Good, Duke's Chief Financial Officer; and Dr. Joseph P. Kalt, a consultant. The Applicants submitted a revised JDA attached to Mr. Weintraub's testimony and identified as Revised Exhibit No. 3.

On September 30, 2011, the Federal Energy Regulatory Commission ("FERC") issued an order conditionally approving the Duke–Progress merger subject to the filing of market power mitigation measures.[4] In light of FERC's order, on October 4, 2011, Central, ECSC, and ORS filed a Joint Motion to Hold Proceeding in Abeyance. The motion was supported by the International Brotherhood of Electrical Workers, Orangeburg, SCEUC, and the Environmental Intervenors.[5] SCE&G did not oppose the

[3] Letter from Len S. Anthony, Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Sept. 13, 2011) ("Withdrawal Letter").
[4] *Duke Energy Corp. & Progress Energy, Inc.*, Docket No. EC11-60-000, 136 FERC ¶ 61,245 (2011), eLibrary No. 20110930-3067. Rehearing petitions were filed by several parties and are pending before FERC.
[5] Joint Motion to Hold Proceeding in Abeyance, Transmittal Letter at 1.

joint motion,[6] and Nucor Steel–South Carolina took no position.[7] On October 10, 2011, DEC and PEC notified the Commission that they did not oppose the joint motion, but requested that the Commission reschedule testimony filing deadlines and the hearing in this matter as soon as possible after the filing of the Applicants' Mitigation Proposal at FERC.[8] Pursuant to Order No. 2011-754 dated October 13, 2011, the Commission suspended all scheduled deadlines and the hearing date pending the filing of mitigation measures with FERC and this Commission.

On October 17, 2011, the Applicants filed the Compliance Filing of Duke Energy Corporation and Progress Energy, Inc. ("Mitigation Proposal") with FERC and this Commission. On October 24, 2011, Central, ECSC, and ORS submitted a Joint Motion to Establish Procedural Schedule supported by several parties, including DEC and PEC.[9] Movants requested that these dockets remain open until FERC issued its final orders on the merger application, the JDA, and a Joint Open Access Transmission Tariff ("OATT"). *Id.*

Pursuant to Order No. 2011-816 dated November 2, 2011, the Commission granted the Joint Motion to Establish Procedural Schedule, with some date modifications. The Commission also granted the joint request that these dockets remain open pending FERC's issuance of final orders in all three merger-related dockets. *Id.*

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[6] Letter from K. Chad Burgess, Counsel for S.C. Elec. & Gas Co., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Oct. 5, 2011).
[7] Letter from Robert R. Smith II, Counsel for Nucor Steel–S.C., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Oct. 10, 2011).
[8] Response of Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc. to Joint Motion to Hold Proceeding in Abeyance at 1.
[9] Joint Motion to Establish Procedural Schedule, Transmittal Letter at 1.

On November 10, 2011, DEC and PEC submitted the Supplemental Direct Testimony of Alexander J. Weintraub, which explained the Applicants' Mitigation Proposal at FERC.[10] Intervenors submitted direct testimony on November 17, 2011. Orangeburg submitted the Direct Testimony and Exhibits of John Bagwell, Director of the Electric Division of the City of Orangeburg Department of Public Utilities; ORS submitted the Direct Testimony and Exhibit of Jonathan Falk, a consultant; and the Environmental Intervenors submitted the Direct Testimony and Exhibits of Richard S. Hahn, a consultant. DEC and PEC submitted the rebuttal testimonies of William D. Johnson and James E. Rogers, Lynn Good, Dr. Joseph P. Kalt, and Alexander J. Weintraub on November 30, 2011. No surrebuttal testimony was submitted.

On December 8, 2011, the Environmental Intervenors withdrew the Testimony of Richard S. Hahn in light of ongoing settlement discussions with the Applicants.[11] In response, DEC and PEC withdrew their previously-filed rebuttal testimonies and submitted revised rebuttal testimonies on behalf of William D. Johnson and James E. Rogers, Alexander J. Weintraub, and Dr. Joseph P. Kalt.[12]

A hearing in this matter was held on December 12, 2011. On December 13, 2011, DEC and PEC submitted a letter purporting to memorialize DEC's and PEC's agreement at the hearing to provide the Commission with a "most favored nations" commitment.[13]

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[10] Supplemental Direct Testimony of Alexander J. Weintraub at 1.
[11] Letter from Gudrun Thompson, Counsel for Envtl. Def. Fund, S.C. Coastal Conservation League & S. Alliance for Clean Energy, to Hon. Jocelyn Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Dec. 8, 2011).
[12] Letter from Len S. Anthony, Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Dec. 8, 2011).
[13] Letter from Len S. Anthony, Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Dec. 13, 2011).

A Settlement Agreement among the Environmental Intervenors, Duke, Progress, DEC, and PEC was filed with the Commission on December 13, 2011. A hearing transcript became available on December 15, 2011.

On December 14, 2011, FERC issued two orders relating to this matter. One rejected the Applicants' market power Mitigation Proposal.[14] The other rejected the JDA and OATT, without prejudice.[15]

On December 16, 2011, at the request of certain parties, the Hearing Officer scheduled a status conference to discuss the effect of FERC's decisions.[16]

On December 20, 2011, the parties filed proposed orders in this proceeding. DEC, PEC, the ORS, Nucor Steel-South Carolina, Central, and ECSC submitted a Joint Proposed Order.[17] The Environmental Intervenors stated that they concurred with the ordering paragraphs of the Joint Proposed Order.[18] Orangeburg also filed a proposed order.[19]

On January 12, 2012, the Applicants updated the Commission with regard to the status of the merger applications filed by Duke and Progress.[20]

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[14] *Duke Energy Corp. & Progress Energy, Inc.*, Docket No. EC11-60-001, 137 FERC ¶ 61,210 (2011), eLibrary No. 20111214-3040 ("Mitigation Proposal Order").
[15] *Duke Energy Corp. & Progress Energy, Inc.*, Docket Nos. ER11-3306, ER11-3307, ER12-115, ER12-116, *Carolina Power & Light Co.*, Docket Nos. ER12-118 & ER12-119, *Fla. Power Corp.*, Docket No. ER12-120, 137 FERC ¶ 61,209 (2011), eLibrary No. 20111214-3041 ("JDA and OATT Order").
[16] Hearing Officer Directive (Dec. 16, 2011).
[17] Joint Proposed Order of Duke Energy Carolinas, LLC, Progress Energy Carolinas, Inc., the Office of Regulatory Staff, Nucor Steel-South Carolina, Central Electric Power Cooperative, and the South Carolina Electric Cooperatives (Dec. 20, 2012) ("December Joint Proposed Order").
[18] Letter from Gudrun Thompson, Counsel for Envtl. Def. Fund, S.C. Coastal Conservation League & S. Alliance for Clean Energy, to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Dec. 20, 2011).
[19] Proposed Order of Intervenor City of Orangeburg, South Carolina (Dec. 20, 2011).
[20] Letter from Len S. Anthony, Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk & Adm'r, Pub. Serv. Comm'n of S.C. (Jan 12, 2012).

On February 15, 2012, DEC and PEC requested an opportunity to brief the Commission on the revised mitigation plan to be filed with FERC.[21] On February 22, 2012, the companies filed a copy of the Advance Notice of Filing of Proposed Mitigation Plan of Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc. submitted to the North Carolina Utilities Commission ("NCUC").[22] On March 26, 2012, the Applicants, DEC, and PEC filed a copy of the Revised Mitigation Proposal submitted to FERC.[23] On April 16, 2012, Duke, Progress, DEC, and PEC filed a copy of their response to FERC's request for additional information regarding the Revised Mitigation Proposal.[24]

On May 16, 2012, DEC and PEC advised the Commission that they had made certain commitments to ORS with regard to the Revised Mitigation Proposal.[25] On May 21, 2012, DEC and PEC submitted a letter clarifying those commitments.[26]

On May 17, 2012, DEC requested an *ex parte* briefing on (1) the status of the merger, (2) recent filings the companies have made with FERC and the NCUC, and (3) the companies' commitments to ORS.[27]

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[21] Email from Frank R. Ellerbe, III, Counsel for Duke Energy Carolinas, LLC., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C., and Joseph Melchers, Hearing Officer, Pub Serv. Comm'n of S.C. (Feb. 17, 2012).
[22] Letter from Frank R. Ellerbe, III, Counsel for Duke Energy Carolinas, LLC, to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Feb. 22, 2012).
[23] Letter from Kendal C. Bowman, Assoc. Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Mar. 26, 2012).
[24] Letter from Kendal C. Bowman, Assoc. Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (Apr. 16, 2012).
[25] Letter from Len S. Anthony, Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (May 16, 2012).
[26] Letter from Len S. Anthony, Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (May 21, 2012).
[27] Email from Frank R. Ellerbe, III, Counsel for Duke Energy Carolinas, LLC., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C., and Joseph Melchers, Hearing Officer, Pub Serv. Comm'n of S.C. (May 17, 2012).

On May 22, 2012, ECSC and Central submitted a letter stating that they support approval of the proposed JDA.[28]

On May 23, 2012, the Commission denied DEC's request for an allowable *ex parte* briefing and instead established a schedule for the filing of verified testimony updating the Commission on the impact of the events and filings since its hearing on December 12, 2011. Order No. 2012-425.

On June 4, 2012, DEC and PEC submitted the Additional Direct Testimony of Alexander J. Weintraub. On June 11, 2012, ORS informed the Commission that it would not be filing testimony.

On June 8, 2012, FERC issued an Order Accepting Revised Compliance Filing, as Modified, and Power Sales Agreements ("June 8 Compliance Order").[29] Also on June 8, 2012, FERC issued an Order on Joint Dispatch Agreement and Joint Open Access Transmission Tariff ("June 8 JDA Order").[30] The June 8 JDA Order conditionally accepted the proposed JDA subject to compliance filings. *Id.* P 21.

On June 11, 2012, ECSC and Central submitted a letter stating that they support approval of the proposed JDA.[31]

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[28] Letter from Michael N. Couick, President and CEO, The Elec. Coops. of S.C., Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C., and Joseph Melchers, Hearing Officer, Pub. Serv. Comm'n of S.C. (May 22, 2012).

[29] Order Accepting Revised Compliance Filing, as Modified, and Power Sales Agreements, 139 FERC ¶ 61,194 (2012).

[30] Order on Joint Dispatch Agreement and Joint Open Access Transmission Tariff, 139 FERC ¶ 61,193 (2012).

[31] Letter from John H. Tiencken, Jr., Counsel for The Elec. Coops. of S.C., Inc. and Cent. Elec. Power Coop., Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (June 11, 2012).

On June 12, 2012, Duke, Progress, DEC, and PEC submitted a revised JDA that had been modified to comply with FERC's June 8 JDA Order ("June 12 JDA").[32]

On June 13, 2012, DEC and PEC submitted the Further Supplemental Testimony of Alexander J. Weintraub. On the same day, the Commission found that additional oral testimony was not required and that no additional hearing would be held at this time. Order No. 2012-473. The Commission set a deadline for responses to Applicants' verified testimony and directed that updated proposed orders be filed no later than close of business on Friday, June 22, 2012. *Id.*

On June 15, 2012, ORS informed the Commission that it had no further comments on the filings in this docket.

III. DISCUSSION OF EVIDENCE AND CONCLUSIONS

A. FERC's Order Conditionally Accepting the JDA (Finding Nos. 1-2)

The Commission takes administrative notice of FERC's June 8 JDA Order. In that order, FERC stated that the Applicants had filed the JDA with FERC "pursuant to section 205 of the Federal Power Act [("FPA")] and Part 35 of [the FERC's] regulations." *Id.* P 1; *see also* Tr. 52:9-12. FERC accepted the JDA but required the Applicants to modify it in two ways. First, FERC found that "section 3.2(c) of the JDA contains provisions pertaining to retail ratemaking that are not appropriately included in a wholesale agreement before this Commission." June 8 JDA Order P 21. Accordingly, FERC directed the Applicants "to omit the provisions in section 3.2(c)(ii)-(iv) from the JDA." *Id.* P 37. Second, FERC found that "the JDA's allocation of different cost levels

[32] Ex. 1 to Letter from Kendal C. Bowman, Assoc. Gen. Counsel, Progress Energy Carolinas, Inc., to Hon. Jocelyn G. Boyd, Chief Clerk and Adm'r, Pub. Serv. Comm'n of S.C. (June 12, 2012).

for new and existing non-native load customers [was] unjust, unreasonable, and unduly discriminatory or preferential." *Id.* P 21. Accordingly, FERC directed the applicants to "remov[e] the distinction between the existing non-native load customers and new non-native load customers." *Id.* P 46. We conclude that the June 8 JDA Order represents an exercise of FERC's jurisdiction under the FPA. *See id.* P 1.

B. The Commission's Jurisdiction Over the JDA (Finding Nos. 3-6)

Although the Applicants have sought this Commission's approval of the JDA, the terms of that agreement raise serious concerns regarding our jurisdiction. At hearing, CEO Johnson acknowledged and reaffirmed that the Applicants sought this Commission's approval of the JDA. Tr. 52:5-8. Nevertheless, as made clear by FERC's recent actions, and as also acknowledged by the Applicants (*id.* 52:9-12), the Applicants also filed the JDA at FERC and sought FERC's approval of the JDA. As described in section III.A, *supra*, FERC has conditionally approved the JDA.

Moreover, the best evidence concerning the JDA is the language of the agreement itself. While titled as a "dispatch" agreement, it appears that the core provision of the JDA is that it establishes the terms and conditions by which DEC will sell power to PEC and PEC will sell power to DEC. At Section 7.1(b), the JDA recognizes that when one party's power supply resources are used to serve the other party's load obligations, the "*provision of energy shall be considered to be a wholesale power transaction between the Parties*." June 12 JDA § 7.1(b) (emphasis added). We thus conclude that the JDA is a contract for wholesale sales in interstate commerce between DEC and PEC.

This Commission has no jurisdiction to regulate sales of wholesale power in interstate commerce. Chapter 27 of Title 58 of the South Carolina Code, which governs

the regulation of electrical utilities and cooperatives, does not "apply to commerce . . . among the several states of the United States, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress." S.C. Code. Ann. § 58-27-110. Under Part II of the FPA, Congress granted to the Federal Power Commission (the predecessor of FERC) "jurisdiction [over] 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *New York v. FERC*, 535 U.S. 1, 6-7 (2002) (quoting FPA § 201(b), 16 U.S.C. § 824(b)). FERC has "*exclusive* regulatory authority over rates charged for electricity at wholesale." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 337 (1982) (emphasis added). United States Supreme Court precedent requires us to "give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). Accordingly, our regulation of wholesale sales in interstate commerce is not permitted under the provisions of the Constitution of the United States and the acts of Congress—nor is it permitted by South Carolina law.

As the exclusive regulator of wholesale sales of power pursuant to the Federal Power Act, only FERC has the power to address the rates, terms, and conditions pursuant to which wholesale power is sold in interstate commerce. *See* FPA §§ 201(b) and 205, 16 U.S.C. §§ 824(b) and 824d. "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). This Commission "may not regulate in areas where FERC has properly

exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Id.* The JDA was filed as a rate schedule at FERC, and FERC accepted it. June 8 JDA Order PP 1, 21; *see also* Tr. 52:9-12. As Commissioner Fleming noted at hearing, "we have no jurisdiction over setting terms and rates of wholesale sales." Tr. 229:7-8. Because the JDA is a contract for wholesale power sales, its terms are subject to the exclusive jurisdiction of FERC. Accordingly, we find that this Commission lacks jurisdiction to approve the JDA.

We note in this regard that the North Carolina Utilities Commission has no greater authority to regulate wholesale sales in interstate commerce than we do. Yet Witnesses Bagwell and Rogers explained how the NCUC has used its retail ratemaking authority to prevent Duke and Orangeburg from implementing a wholesale power agreement based on an agreed-upon system average cost pricing. Tr. 220:1-21, 56:8-57:18. Central to the NCUC's claimed authority to second guess the terms of a FERC wholesale transaction are several agreed upon North Carolina Regulatory Conditions that purport to distinguish between DEC and PEC native wholesale customers entitled to purchase power (in the eyes of the NCUC) at favorable rates. Witness Rogers admitted that DEC had refused to bid to sell wholesale power to Orangeburg "[b]ecause the North Carolina Commission had ruled that it [would] be [treated as] an incremental cost [transactions for purpose of North Carolina retail ratemaking] and not at kind of a rolled-in average cost, and it was our judgment that we couldn't win the bid at the incremental cost level." Tr. 57:6-9. Witness Rogers explained that the JDA defines who is entitled to native load treatment "[c]onsistent with the North Carolina ruling." Tr. 57:19-24. The Applicants have proposed and agreed to new North Carolina Regulatory Conditions that

would supersede and are intended to replace the existing conditions but maintain the NCUC's purported authority to determine DEC's and PEC's wholesale native load customers eligible to purchase requirements power at favorable prices and have the terms of those sales honored for purposes of retail ratemaking.[33]

Orangeburg witness Bagwell explained how the native/non-native load distinction in the JDA and proposed new Regulatory Conditions could hurt Orangeburg's competitiveness by providing other utilities—the majority of which are in North Carolina—with a low-cost wholesale power supply that is not available to Orangeburg. Tr. 223:6-15, 225:25-29.

It has been settled law since 1927 that the States are preempted from regulating wholesale sales of electricity in interstate commerce. In *New York v. FERC*, the United States Supreme Court explained that the genesis of federal rate regulation over public utility sales of wholesale electricity was to respond, in substantial part, to the regulatory "gap" that otherwise existed because the individual states were unable to act in this area.

> Prior to 1935, the States possessed broad authority to regulate public utilities, but this power was limited by our cases holding that the negative impact of the Commerce Clause prohibits state regulation that directly burdens interstate commerce. When confronted with an attempt by Rhode Island to regulate the rates charged by a Rhode Island plant selling electricity to a Massachusetts company, which resold the electricity to the city of Attleboro, Massachusetts, [the Court] invalidated the regulation

[33] Ex. 1 to Prefiled Direct Testimony of John Bagwell, Regulatory Condition 3.9(a) (stating that that, with respect to all wholesale contracts the utilities enter into as seller, the North Carolina Utilities Commission "retains the right to assign, allocate, impute, and make pro-forma adjustments with respect to the revenues and costs associated with both DEC's or PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes."). The cited exhibit was filed as Appendix A to Response of the Public Staff, *Application of Duke Energy Corp. & Progress Energy, Inc., to Engage in a Business Combination Transaction and to Address Regulatory Conditions & Code of Conduct*, Docket Nos. E-2, Sub 998 & E-7, Sub 986 (N.C. Utils. Comm'n Sept. 15, 2011).

> because it imposed a "direct burden upon interstate commerce." *Public Util. Comm'n of R.I. v. Attleboro Steam and Elec. Co.*, 273 U.S. 83, 89 (1927). Creating what has become known as the "*Attleboro* gap," [the Court] held that this interstate transaction was not subject to regulation by either Rhode Island or Massachusetts, but only "by the exercise of the power vested in Congress." *Id.*, at 90.
>
> When it enacted the [Federal Power Act] in 1935, Congress authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*.

New York v. FERC, 535 U.S. at 6 (footnotes omitted).

Moreover, pursuant to the Commerce Clause of the U.S. Constitution, it is also the case that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *New England Power Co. v. New Hampshire*, 455 U.S. at 338 (internal quotations omitted). Recognizing that we lack jurisdiction over sales of power at wholesale, we do not look favorably on the JDA's facilitation of protectionist measures by other states at the expense of South Carolina market participants. We do not believe that North Carolina should be in the business of deciding which South Carolina customers are entitled to wholesale native load status and thus eligible to purchase attractively priced wholesale power from DEC and PEC.[34]

[34] Orangeburg witness Bagwell acknowledged (consistent with the testimony of CEO Rogers, Tr. 57) that the current Regulatory Conditions are an impediment to Orangeburg's ability to purchase average system cost power from DEC. Tr. 227-28. This Commission sees no reason why it is desirable to perpetuate that situation going forward assuming the two companies are able to consummate the merger.

C. The Commission's Jurisdiction Over the Proposed Merger (Finding Nos. 7-10)

The acquisition of Progress by Duke "will occur at the holding company level." Application ¶ 6; Tr. 24:14. The Applicants have explained that Duke "is a holding company that does not own or operate utility assets in South Carolina." Application ¶ 1. Likewise, Progress "is a holding company that does not own or operate utility assets in South Carolina." Application ¶ 2.

South Carolina's statutes do not provide this Commission with authority over a merger of holding companies. S.C. Code Ann. § 58-27-1300 provides only that an "electrical utility" must obtain Commission approval before it may "sell, assign, transfer, lease, consolidate, or merge its utility property, powers, franchises, or privileges." An "electrical utility" includes persons and corporations "owning or operating in this State equipment or facilities for generating, transmitting, delivering, or furnishing electricity for street, railway, or other public uses or for the production of light, heat, or power to or for the public for compensation." S.C. Code Ann. § 58-27-10(7). Stated simply, we possess authority over a merger of the two operating companies, i.e., DEC and PEC, but that matter is not before us. Duke and Progress are not electrical utilities within the meaning of either provision. As a result, this Commission has no jurisdiction over Duke's acquisition of Progress.

Although Applicants originally sought this Commission's approval of a merger between DEC and PEC, it has become clear that no such merger is imminent. Applicants have formally withdrawn their application for approval of the merger between DEC and

PEC,[35] and we see no reason for this Commission to address the inchoate prospect of a merger. Witnesses Rogers and Johnson stated in their pre-filed testimony that "it will likely be at least several years before PEC and DEC merge." Tr. 24:17-18. Mr. Rogers stated at the hearing that the Applicants "will not combine [DEC and PEC] until the rates of both Progress/South Carolina and Duke/South Carolina are at the same level." Tr. 68:25-69:2. Thus, Mr. Rogers explained that "it will be awhile . . . before we're able to combine the rates of the two companies, because of the existing gap between the two." Tr. 69:15-17. When asked for her best estimate of when the operating companies would merge, Witness Good responded that the companies would "be working on the consolidation of business practices" as well as "looking forward to the time when there's parity in rates," which she did not expect to occur for "several years." Tr. 73:12-16. Witness Rogers explained that when Duke Energy/North Carolina acquired Nantahala, "it took 15 years before we could combine those two companies and get the rates levelized." Tr. 90:7-10. Because the merger of the electric utilities will not occur for several years, if ever, it is not proper for the Commission at this point in time to address this matter pursuant to S.C. Code Ann. § 58-27-1300.

D. The Commission's Jurisdiction Over the Change in Generation Dispatch (Finding Nos. 11-12)

The Applicants have argued that pursuant to S.C. Code Ann. § 58-27-1300, the Commission must approve the transfer of any utility property, including the transfer of operational control of PEC's generating assets as contemplated by the JDA.[36] In doing

[35] Withdrawal Letter.
[36] December Joint Proposed Order at 20-21, 24 (Dec. 20, 2011).

so, the Applicants read words into the statute that do not exist. Section 58-27-1300 states, in relevant part, that: "No electrical utility, without the approval of the commission and compliance with all other existing requirements of the laws of the State in relation thereto, may sell, assign, transfer, lease, consolidate, or merge its utility property." The statute speaks exclusively in terms of "the transfer of . . . utility property," and by its literal terms does not reach "the transfer of operational control of utility property." Had the legislature intended such a grant of authority it is reasonable to believe that it would have enacted language to that effect, as is the case in other state utility statutes. *See, e.g.*, Ky. Rev. Stat. 278.218 ("No person shall acquire or transfer ownership of or control, or the right to control, any assets that are covered by a utility . . . without prior approval of the commission"). In the circumstances here, the Applicants are contracting concerning the rates, terms, and conditions by which PEC and DEC will sell power to each other. Such a commitment to buy and sell power in no way involves the conveyance of PEC's generation to DEC, or *vice versa*, by means of sale, assignment, transfer, lease, consolidation, or merger.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The JDA was filed with FERC as a proposed rate schedule pursuant to Federal Power Act Section 205, and FERC conditionally accepted the JDA subject to compliance filings.

2. FERC has, pursuant to the Federal Power Act, exercised its jurisdiction over the JDA.

3. The Joint Dispatch Agreement is a contract for wholesale sales in interstate commerce between DEC and PEC.

4. This Commission lacks jurisdiction over wholesale sales of electricity in interstate commerce. S.C. Code Ann. § 58-27-110; U.S. Const. art. I, § 8; *Pub. Util. Comm'n of R.I. v. Attleboro Steam and Elec. Co.*, 273 U.S. 83, 89 (1927); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

5. FERC has exclusive jurisdiction over wholesale sales of electricity in interstate commerce. FPA § 201(b), 16 U.S.C. § 824(b); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988).

6. This Commission lacks jurisdiction to approve the JDA.

7. Duke and Progress are holding companies that do not directly own or operate equipment or facilities for generating, transmitting, delivering, or furnishing electricity to the public for compensation in South Carolina.

8. Duke and Progress are not electrical utilities within the meaning of S.C. Code Ann. § 58-27-10(7).

9. The merger of the operating companies DEC and PEC is not imminent.

10. The Commission lacks jurisdiction to address the merger of Duke and Progress.

11. The proposed transaction does not involve the conveyance of PEC's generation to DEC, or *vice versa*, by means of sale, assignment, transfer, lease, consolidation, or merger.

12. S.C. Code Ann. § 58-27-1300 does not apply to the JDA.

IT IS THEREFORE ORDERED THAT:

This proceeding is dismissed for lack of jurisdiction.

BY ORDER OF THE COMMISSION:

ATTEST:

_____ _____

John E. Howard, Chairman

David A. Wright, Vice Chairman
(SEAL)